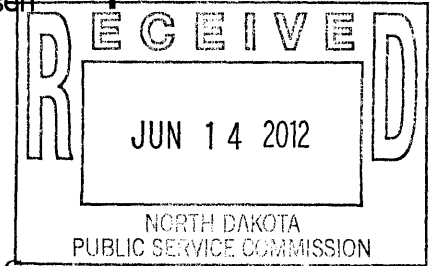


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Sioux Falls, SD 57041

Re: Public Service Commission v. Mitchell Feeds, Inc. and Western Surety Company
Civil No.: 08-2011-CV-917

Dear Counsel:

Enclosed are the following documents for the above-referenced matter:

- Intervenor Farmers' Response to Intervenor American Federal Bank's Motion For Summary Judgment; and
- Certificate of Service.

Sincerely,

A handwritten signature in cursive script that reads "Debbie Miller".

Debbie Miller
Legal Assistant

DM/dim

Enclosures

Copy: David DesLauriers

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

Public Service Commission,)

Civil No. 08-2011-CV-917

Plaintiff,)

v.)

PSC Case No. GE-11-051

Mitchell Feeds, Inc. and Western Surety)

Company,)

Respondents,)

Micheal Aasen, Donald Ackerson, Sheldon)

**INTERVENOR FARMERS' RESPONSE
TO INTERVENOR AMERICAN
FEDERAL BANK'S MOTION FOR
SUMMARY JUDGMENT**

Ackerson, Lana Anderson d/b/a Northland)

Farms, B & D Farms, Inc., Busch Farms, Inc.,)

David Deslauriers, Scott Lazorenko, Manna)

Farms, Inc., Nathan Neameyer, Steven)

Neameyer, Mitch Preskey, Paul Rohde, James)

Routledge, Bart Savelkoul d/b/a Savelkoul)

Farms, Mike Schollmeyer, David Steeves,)

Robert Steeves, Paul Trout, Wurgler Farms,)

and Kelly Wurgler,)

and)

American Federal Bank,)

Intervenors.)

I. INTRODUCTION

Intervenors Micheal Aasen, Donald Ackerson, Sheldon Ackerson, Lana Anderson d/b/a Northland Farms, B & D Farms, Inc., Busch Farms, Inc., David Deslauriers, Scott Lazorenko, Manna Farms, Inc., Nathan Neameyer, Steven Neameyer, Mitch Preskey, Paul Rohde, James Routledge, Bart Savelkoul d/b/a Savelkoul Farms, Mike Schollmeyer, David Steeves, Robert Steeves, Paul Trout, Wurgler Farms, and Kelly Wurgler, (collectively "Farmers") submit this

Response to Intervenor American Federal Bank's ("Bank") Motion for Summary Judgment. Plaintiffs respectfully request that this court deny the Bank's Motion or delay a determination on the Motion because the Farmers have a sufficient interest in the outcome of the case to establish standing to bring their claims, such claims are not barred by res judicata or collateral estoppel (and these doctrines are not properly applied to this case), the claims are not barred for any other reason asserted by the Bank, the Farmers have not failed to exhaust their administrative remedies, and the Farmers have an interest in the proceeds of the sunflowers that were held by Respondent Mitchell Feeds, Inc. ("Mitchell Feeds").

II. UNDISPUTED MATERIAL FACTS

Although the Farmers dispute the Bank's claim that it holds a first priority lien on certain assets of Mitchell Feeds, the Farmers agree that the Bank's summary of the relevant facts are a fair representation of the events that have transpired thus far. In addition to the facts set forth by the Bank, the following facts are relevant to the present motion:

1. Mitchell Feeds admits that it did not pay the Farmers for the sunflower crops that it purchased from them under 2008 and/or 2009 contracts. See Exhibit A, ¶¶ 31-32, Intervenor American Federal Bank Complaint in Intervention in Minnesota action and Exhibit B, ¶¶ 31-32, Answer of Mitchell Feeds, Inc. to Complaint in Intervention and Demand for Jury Trial.
2. The Bank filed its first motion for summary judgment in the Minnesota action, seeking a determination that it had a first priority security interest in the sunflower inventory and/or proceeds, on July 14, 2011. Its motion was denied on November 28, 2011.

3. After filing this Motion, the Bank filed a motion for a Supplemental Order Pursuant to Minn.R.Civ.P. 54.02¹ on May 7, 2012 in the Minnesota action, requesting that the court supplement its Order and Judgment and certify such judgment as final for purposes of appeal.

4. The Minnesota Court granted the Bank's Motion to Supplement its Order and Judgment and certified such judgment for appeal on June 4, 2012.

III. LAW AND ARGUMENT

A motion for summary judgment should only be granted when, viewing the evidence in favor of the party against whom the motion is sought, there is not a genuine issue of material fact and the party seeking summary judgment is entitled to it as a matter of law. Greenwood v. American Family Ins. Co., 398 N.W.2d 108, 111-12 (N.D. 1986) (citing Brown v. North Dakota State University, 372 N.W.2d 879 (N.D. 1985)). The moving party has the burden of establishing that there is no genuine issue as to any material fact or as to any inferences reasonably deducible therefrom. Greenwood, 398 N.W.2d at 112 (citing Benson County Co-op Credit Union v. Central Livestock Ass'n, Inc., 300 N.W.2d 236 (N.D. 1980); Farmers Elevator Co. v. David, 234 N.W.2d 26 (N.D. 1975)). For the following reasons, the Bank cannot establish that it is entitled to summary judgment as a matter of law and its motion must be denied or a decision on the Bank's Motion must be stayed pending an appeal of the judgment in the Minnesota action.

A. The Farmers Have Standing to Bring Their Claims.

The Bank asserts that the Farmers cannot request declaratory judgment from this court because they lack standing as beneficiaries of the statutory trust. "The purpose of the [declaratory judgment] provision is to enable the court to expedite adjudication in a proper case in order to prevent the accrual of damages or to further the early adjudication of a controversy."

¹ Minn.R.Civ.P. 54.02 is analogous to N.D.R.Civ.P. 54(b).

City of Grand Forks v. Grand Forks Herald, Inc., 307 N.W.2d 572, 575 (N.D. 1981), (citing 6 Moore's Federal Practice P 57.29; Wright & Miller, Federal Practice and Procedure: Civil s 2751 and s 2768.). Despite the fact that the trust and the insolvency statutes in general were created for the sole benefit of protecting and compensating the farmers, the Bank claims that the trustee, the Public Service Commission ("PSC"), and only the trustee may request a determination of the parties' rights to the sunflowers or proceeds of the sunflowers that were held by Mitchell Feeds.² The Bank's position has no support in North Dakota law and the Farmers have sufficient individual rights to the grain or grain proceeds to confer standing to assert their claims to the sunflowers in accordance with N.D.C.C. § 32-23-04 and N.D.C.C. § 60-02.1-32.

"The standing requirement focuses on whether the plaintiffs have alleged such a personal stake in the outcome of the controversy to justify a court's exercise of remedial powers on their behalf." Kjolsrud v. MKB Management Corp., 2003 ND 144, ¶ 13, 669 N.W.2d 82. The two-prong test to determine standing requires that: (1) plaintiffs must suffer some threatened or actual injury resulting from the putatively illegal action, and (2) the asserted harm must not be a generalized grievance shared by all or a large class of citizens, i.e., plaintiffs generally must assert their own legal rights and interests and cannot rest their claim for relief on the legal rights and interests of third parties. Nodak Mut. Ins. Co. v. Ward County Farm Bureau, 2004 ND 60, 676 N.W.2d 752. "Standing" is the concept used to determine if a party is sufficiently affected so as to insure that a justiciable controversy is presented to the court. Rebel v. Nodak Mut. Ins. Co., 1998 ND 194, 585 N.W.2d 811.

² The Bank later argues, however, that the PSC cannot request a declaratory judgment on the matter either. See Bank's Brief, p. 9, ("The declaratory judgment claim against American Federal does not meet the definition of any of the suits which the PSC is given the authority to maintain in order to marshal assets.") The Bank essentially argues then that neither the Farmers nor the PSC have the authority to request a determination from this court challenging its claims to the sunflowers, despite the fact that the Bank has effectively done exactly this in its brief.

1. The Farmers Have Suffered Actual Harm.

Mitchell Feeds has admitted that it failed to pay the Farmers for the sunflower crops that it purchased from them under 2008 and/or 2009 contracts. See Exhibit A and Exhibit B, ¶¶ 31-32. As conceded by the Bank, the Farmers satisfy the first prong of the test and have suffered an actual harm. Bank's Brief, p. 7. Despite its concession that each of the Farmers has suffered a personal harm, the Bank asserts that they do not have sufficient rights to request a remedy for that harm from this court. Not only does the Bank's argument fail to address the requirements of the second prong of the standing requirements, it is also erroneous because the Farmers have significant individual rights at stake in this proceeding.

2. The Farmers Have Sufficient Individual Rights to Confer Standing.

The second prong of the standing test requires that the harm asserted must not be a generalized grievance shared by all or a large class of citizens and must be based on the party's individual rights. The Bank does not claim that the Farmers are asserting only a generalized grievance; it claims only that the Farmers do not have sufficient individual interests to assert claims as beneficiaries of the trust and that they do not have a private right of action under which they may assert their claims and request for declaratory judgment.

The Bank cites to several cases which it claims support a general proposition that a trust beneficiary may not bring an action at law against a third party and the right to bring such action belongs only to the trustee. See Bank's Brief, pp. 6-8. None of these cases apply or interpret North Dakota law, which specifically provides an exception to the general rule. The Bank overlooks N.D.C.C. § 32-23-04, Declaratory Judgments, which provides, in relevant part:

Any person interested as or through a . . . trustee . . . in the administration of a trust . . . may have a declaration of rights or legal relations in respect thereto:

1. To ascertain any class of creditors, devisees, heirs, next of kin, or others;
2. To direct the personal representatives or trustees to do or abstain from doing any particular act in their fiduciary capacity; or
3. To determine any question arising in the administration of the estate or trust, including questions of construction of wills and other writings.

The legislature has clearly expressed its intention to confer standing upon trust beneficiaries to bring a declaratory judgment action on their own behalf. As claimants and receiptholders of unpaid grain of Mitchell Feeds and the intended recipients of the trust proceeds, the Farmers are persons interested in the administration of the trust and the assets being administered. Under this statute, the Farmers are clearly entitled to a determination of the rights and legal relations of the parties with the regard to the administration of the statutory trust created for their benefit.

Furthermore, the Bank ignores N.D.C.C. § 60-02.1-32 which anticipates and permits that outstanding receiptholders in insolvency actions may intervene in the action as parties on their own behalf to protect their individual interests in gathering and administering the trust assets. The Farmers' interests are not identical to those of the PSC. The Farmers requested, and were granted, intervention of right in order to protect their individual rights and interests in the administration of the bond and trust.³ If the Farmers' interests were always identical to the PSC's, there would be no purpose for the provisions in the insolvency laws specifically allowing claimants such as the Farmers to intervene in the insolvency action.

The Bank also argues that because N.D.C.C. ch. 60-02.1 provides only a statutory procedure for the PSC to follow and does not provide the Farmers with a private right of action, the Farmers cannot request a declaratory judgment in this action. However, as discussed in great

³ It is important to note that the Bank did not object or respond to the Farmers' Rule 24 Motion for Intervention of Right on July 5, 2011, which was subsequently granted.

depth below, N.D.C.C. ch. 60-02.1 provides substantive rights and priority status to Farmers as unpaid receipt holders of the insolvent grain buyer, Mitchell Feeds, to receive the proceeds from the bond established for their protection and compensation for their unpaid receipts. Under N.D.C.C. §§ 32-23-04 and 60-02.1-32, the Farmers may properly request that this court make a determination as to their rights to receive the sunflowers or the sunflower proceeds in the administration of the trust.

Contrary to the Bank's claims, the Farmers' claims for relief do not rest entirely on or derive from the legal rights and interests of the PSC; the Farmers' claims are based first and foremost on their status as individuals who were not paid for their grain by Mitchell Feeds. As the Bank admits, the Farmers have suffered a concrete legal injury. The insolvency laws and statutory trust were created to remedy this harm and provide an efficient and effective avenue for relief short of filing multiple individual lawsuits against an insolvent grain buyer. The establishment and use of the trust provisions to provide a remedy for that harm does not completely eliminate an unpaid farmer's individual right to pursue other distinct remedies for that harm. See N.D.C.C. § 60-02.1-33 ("This chapter does not prohibit any receipt holder, either individually or in conjunction with other receipt holders, from pursuing concurrently any other remedy against the person or property of the licensee.").

The cases generally cited to by the Bank to support its position that the Farmers do not have standing are not applicable because they involve persons who did not suffer a personal injury, who alleged only a generalized harm, or who had standing. See Ackre v. Chapman & Chapman, P.C., 2010 ND 167, 788 N.W.2d 344, 350, reh'g denied (Oct. 19, 2010) (Attorney, who competed with a law firm to represent Native American clients in personal injury actions and alleged that such law firm did not use personal injury settlements to satisfy hospital liens or

reimburse the Department of Health and Human Services for government paid medical expenses, did not have standing to bring action against law firm under attorney misconduct statute, as attorney was not an injured party under such statute); Kjolsrud v. MKB Mgmt. Corp., 2003 ND 144, 669 N.W.2d 82 (Citizen lacked standing to maintain false advertising action against reproductive health care services provider on behalf of herself, women seeking abortions, and the general public, seeking to enjoin distribution of brochure that contained allegedly false statement about claims related to abortions, breast cancer, and future childbearing, where citizen had not read brochures before filing her action and did not allege an injury from provider's putatively illegal action); State v. Carpenter, 301 N.W.2d 106 (N.D. 1980) (Person subject to criminal prosecution, or faced with its imminent prospect, has clearly established standing requirements to oppose prosecution by asserting his relevant constitutional rights). These cases do not provide support for the Bank's assertion that the Farmers failed to satisfy the second prong of the standing requirement.

The cases and authorities cited by the Bank are distinguishable from this case in another key respect; the Farmers, the trust beneficiaries, did not bring an action against a third party, the Bank. This case is an insolvency proceeding brought by the PSC in accordance with its authority and duties under the North Dakota insolvency statutes; it is not a second civil proceeding commenced by the Farmers in an attempt to get a second bite at the apple. Furthermore, the Bank voluntarily filed a claim with the PSC, intervened in the North Dakota insolvency proceedings, subjected itself to the Court's jurisdiction for determination of the issues involved in the administration of the trust, and asserted its claims with regard to the ownership of the sunflowers or the sunflower proceeds. It is nonsensical for the Bank to object to a request to determine conflicting rights to the sunflowers or sunflower proceeds when it subjected itself to

this court's jurisdiction in a proceeding specifically created to determine those rights. See, N.D.C.C. § 60-02.1-37 (Recognizing the PSC's power and duty to determine the existence and validity of existing liens in its report).

The Bank also asserts that the Farmers do not have a private right of action under Minnesota law. It is unclear how this position is relevant to the Bank's arguments since the Farmers have neither claimed nor anticipate that they will make a claim to the sunflowers or sunflowers proceeds under Minnesota grain buyer laws. Because the Farmers are North Dakota citizens or companies, Mitchell Feeds was licensed as a roving grain buyer in North Dakota, and the Farmers' contracts were created in North Dakota, North Dakota law is applicable to resolve the disputes between the parties. The only tie to Minnesota is that the Farmers' sunflowers were transported there for storage purposes and upon learning that Mitchell Feeds was attempting to dispose of the sunflowers, the Farmers were required to take immediate emergency action in Minnesota to secure a restraining order prohibiting Mitchell Feeds from selling and transporting sunflowers that were properly part of the trust in these proceedings. Mitchell Feeds was not licensed as a grain buyer or operator of a grain warehouse in Minnesota and Minnesota's substantive grain buyer laws do not apply to the Farmers' claims against Mitchell Feeds.

The Bank essentially claims that neither the Farmers nor the PSC has the right to request a declaratory judgment in these proceedings. See Bank's Brief, p. 9, ("The declaratory judgment claim against American Federal does not meet the definition of any of the suits which the PSC is given the authority to maintain in order to marshal assets."). Thus, the Bank is asking this court to find that their claims may not be challenged. To accept these arguments, one must agree that neither the Farmers nor the PSC may assert their rights to the sunflowers and both are required to

sit idly by while the Bank absconds with the fruits of the farmers' labor, uncontested and without the Farmers receiving a penny. This flies in the face of the purpose of the insolvency statutes.

Because the Bank has admitted that the Farmers suffered a personal harm, does not claim that the Farmers' harms are capable of being asserted by the general population and the Farmers have established that they have a sufficient personal stake in the outcome to confer standing, the Bank's claims that the Farmers lack standing is meritless.

B. Res Judicata and Collateral Estoppel Do Not Preclude the Farmers' Claims, or a Decision on the Claims Must Be Stayed.

Although at the time the Bank filed the present motion, the Minnesota court had not certified its Order and Judgment for appeal under Minn.R.Civ.P. 54.02, the Bank nevertheless asserts that a final judgment existed for purposes of res judicata.⁴ Putting aside the Bank's error in making such a representation to this court, Minnesota case law and the purpose of the doctrines of res judicata and collateral estoppel do not support the application of the doctrines to dismiss the Farmers' request for a declaratory judgment.

First, the Bank improperly brought its claim for determination of whether its lien had priority over the Farmers' statutory lien in the Minnesota action. The PSC is the agency charged with administering the insolvency of Mitchell Feeds, and therefore in determining whether certain claims in the insolvency proceeding are valid or not. The insolvency proceeding is similar to a bankruptcy proceeding, in that a claimant in a bankruptcy cannot simply go to another court and get a judgment that it has a priority lien, then return to the bankruptcy court claiming res judicata binding upon that court. The insolvency proceedings are the same. The

⁴ As a general rule, partial summary judgments are not final judgments. Fin. Relations Bd. v. Pawnee Corp., 308 Minn. 109, 112, 240 N.W.2d 565, 566 (1976), (citing 6 Moore, Federal Practice, s 56.02(12); 10 Wright & Miller, Federal Practice and Procedure, Civil s 2715.)

Bank cannot go to a Minnesota court in a breach of contract action and obtain a judgment, and then return to the insolvency proceeding claiming that the Minnesota judgment is binding and has res judicata effect. This undermines the entire statutory process set out for the insolvency proceedings, and the Bank's Minnesota judgment simply does not have any res judicata or collateral estoppel effect in this insolvency proceeding. Even if the court determines that it does, however, the doctrines should not apply to effect dismissal of the Farmers' request for a declaratory judgment.

The purpose of the doctrines of res judicata and collateral estoppel is to avoid relitigation of claims and issues and to promote the finality of judgment. Riverwood Commercial Park, L.L.C. v. Standard Oil Co., Inc., 2007 ND 36, 729 N.W.2d 101, 106. The doctrines are typically used to conserve judicial resources and avoid confusion that can arise from multiple actions. Res judicata, or claim preclusion, is the more sweeping doctrine that prohibits the relitigation of claims or issues that were raised or could have been raised in a prior action between the same parties or their privies and which was resolved by final judgment in a court of competent jurisdiction. Hofsommer v. Hofsommer Excavating, Inc., 488 N.W.2d 380, 383-84 (N.D. 1992) (internal citations omitted). On the other hand, collateral estoppel, or issue preclusion, generally forecloses the relitigation, in a second action based on a different claim, of particular issues of either fact or law which were, or by logical and necessary implication must have been, litigated and determined in the prior suit. Id. The central tenet behind the application of the doctrines of res judicata and collateral estoppel is that there has been a final determination on the merits which shall not be disturbed. Because of the complex and unique nature of the actions at issue in this suit, it is apparent that such purpose is not served and the doctrines should not apply to

dismiss the Farmers' request for declaratory judgment. Indeed, application of the doctrines in such a manner would result in greater confusion and waste judicial resources.

In a series of cases and appeals in Brown-Wilbert Inc. et al. v. Copeland Buhl & Co. P.L.L.P et al., both the Minnesota Court of Appeals and Minnesota Supreme Court recognized that a pending appeal affects the applicability of the doctrine of res judicata. 715 N.W.2d 484, 488 (Minn. Ct. App. 2006) ("Brown I") aff'd on other grounds, 732 N.W.2d 209 (Minn. 2007) ("Brown II"). In Brown I, the Minnesota Court of Appeals reversed the trial court's dismissal of the plaintiff's second suit against the defendants because the first suit was still in the appeal process. Id. The Court of Appeals explained that "finality in the first lawsuit continues to be suspended due to this court's remand of three counts and the Minnesota Supreme Court's pending review of the remaining count." Id. at 488. Although it disagreed with the appellate court's reasoning, the Minnesota Supreme Court in Brown II found that the appeal and modification of the judgment in Brown I altered the res judicata effect of judgment.

The Minnesota Supreme Court affirmed that a judgment is final for res judicata purposes when it is entered, but acknowledged "that this rule presents the somewhat awkward possibility that a judgment that is given res judicata effect in a second action may later be reversed on appeal." Brown-Wilbert, Inc. v. Copeland Buhl & Co., P.L.L.P., 732 N.W.2d 209, 221 (Minn. 2007). The Minnesota court went on to explain: "Substantial difficulties result from the rule that a final trial court judgment operates as res judicata while an appeal is pending. The major problem is that a second judgment based upon the preclusive effects of the first judgment should not stand if the first judgment is reversed. In some cases, litigants and the courts have collaborated so ineptly that the second judgment has become conclusive even though it rested solely on a judgment that was later reversed. This result should always be avoided...." Id.

(citing 18A Charles Allan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 4433, at 88-89 (2d ed. 2002)). If the court determines that res judicata or collateral estoppel applies, the best way to avoid such an awkward result in this case is to “delay[] further proceedings in [this action] pending conclusion of the appeal in the Minnesota action....” Id.

At the time that the Bank filed its motion, the appeal period for the Minnesota court’s Order granting the Bank’s motion for partial summary judgment had not yet begun because the judgment had not been certified as final for purposes of appeal. Currently, the period to appeal the Minnesota court’s decision just began and the Farmers are in the process of requesting an appeal of the Minnesota court’s decision. Because the Minnesota court failed to address the Farmers’ arguments in its decision, its conclusions within the Order and Judgment are not supported by the applicable law, and the PSC was not a party (or privy to a party) to the Minnesota case and cannot be bound by its judgment, and for several other reasons, it is likely that the judgment in Minnesota will be reversed or remanded. Furthermore, because the issues at stake all arise under North Dakota law, the insolvency proceedings are occurring (and must occur) in North Dakota, and the parties involved are all North Dakota residents or companies, the North Dakota insolvency proceeding is the proper forum for the determination of the issues. Indeed, much like a bankruptcy proceeding, it is the insolvency proceedings under North Dakota law that is the appropriate forum to determine claims; not a collateral breach of contract action in Minnesota. The Bank has created a jurisdictional knot by raising its claims in the Minnesota contract action as well as through its claim more properly made in the insolvency proceeding. The Minnesota court should not have made a determination of claims which are to be determined by the PSC under the insolvency laws. See N.D.C.C. § 60-02.1-27.

If the court decides to apply res judicata or collateral estoppel, in order to avoid the awkward situation that would likely occur if the doctrines of res judicata and collateral estoppel were applied to the Farmers' claims at this time, where this court's judgment would be based on a judgment that is likely to be reversed or remanded, any decision on the Bank's res judicata and collateral estoppel arguments should be delayed until the exhaustion of the appeal process in the Minnesota case. See, Brown-Wilbert, Inc., 732 N.W.2d at 221 (citing 18A Charles Allan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4433, at 88-89 (2d ed. 2002) ("This result should always be avoided . . . by delaying further proceedings in the second action pending conclusion of the appeal in the first action). The Farmers submit that this is the best way for the litigants and courts to collaborate to avoid the awkward situation where a second judgment becomes final despite being based on a first judgment that is later reversed.

It must also be noted that the Bank fails to satisfy a key element for the application of res judicata and collateral estoppel; that this case involves the same parties, or their privies, as the Minnesota case. Putting aside the very different nature of each of the suits, the parties involved are not the same and the Farmers are not in privity with the PSC for purposes of res judicata.⁵ The PSC is not a party to the Minnesota action. First, as noted above, although the PSC's interests in the sunflower proceeds are closely aligned with the Farmers, the interests differ in certain respects; for example, the PSC represents the interests of several claimant farmers who are not parties to the Minnesota case and who would presumably dilute Farmers' interests if they were determined to have valid interests in the sunflowers. "Privity exists if a person is so identified in interest with another that he represents the same legal right." Ungar v. North

⁵ The Bank omits parties involved in each suit. In the North Dakota case, Western Surety is also a party to the suit and there are claimants not represented by counsel. In the Minnesota case, Mitchell Farms, Inc. is also a defendant.

Dakota State University, 721 N.W.2d 16, 21. Second, although the Farmers and the PSC communicated with regard to the Minnesota suit and counsel for the Farmers relayed that communication to the Minnesota court, the Farmers did not purport to represent the interests of the PSC in the Minnesota action. Further, the PSC interests simply cannot be represented in a breach of contract action in Minnesota. The PSC is charged with administering the insolvency laws in the North Dakota court, and it cannot do this in the Minnesota action. Because the PSC is not bound by the Minnesota court's determination, it remains free to request a determination confirming that the sunflowers or sunflower proceeds must be administered to the Farmers (and as even the Bank understands, it must request that determination from this court when it receives an objection to its report). The Bank has not satisfied all of the necessary elements for the application of res judicata and collateral estoppel, and the application of the doctrines to the Farmers' claim will not serve the intended purposes. The PSC is free to and will likely be required to seek an order from this court declaring that the sunflowers or sunflower proceeds must be administered as part of the trust, and thus application of the doctrines as requested by the Bank is not supported or practicable under these circumstances. Indeed, the purpose of the doctrines supports a stay in the proceedings and an efficient collaboration between the litigants and the court in order to ensure that judicial and public resources are not wasted.

C. The Sunflowers and/or Proceeds from the Sale of the Sunflowers Are Part of the Trust Corpus under N.D.C.C. § 60-02.1-30.

The Bank argues that the Farmers cannot request a declaratory judgment in this case because the sunflowers or proceeds from the sale of the sunflowers are not part of the trust corpus under N.D.C.C. § 60-02.1-30. The Bank's assertion that the sunflowers cannot be included in the statutory trust and that the Farmers have no claim to the sunflowers is erroneous.

Generally, statutory interpretation is a question of law and fully reviewable on appeal. Words in a statute are given their plain,

ordinary, and commonly understood meaning, unless defined by statute or unless a contrary intention plainly appears. Statutes are construed as a whole and are harmonized to give meaning to related provisions. This Court harmonizes statutes when possible to avoid conflict between them. Our interpretation of a statute must be consistent with legislative intent and done in a manner to further the policy goals and objectives of the statutes.

Pub. Serv. Comm'n v. Minnesota Grain, Inc., 2008 ND 184, ¶¶ 9-10, 756 N.W.2d 763, 766.

The plain language of N.D.C.C. § 60-02.1-30 establishes that the sunflowers held by Mitchell Feeds are properly a part of the trust fund established for the benefit of Farmers.

Upon the insolvency of any licensee, a trust fund must be established for the benefit of noncredit-sale receiptholders and to pay the costs incurred by the commission in the administration of the insolvency. The trust fund must consist of the following:

1. Nonwarehouse receipt grain of the insolvent licensee held in storage or the proceeds obtained from the conversion of such grain.

N.D.C.C. § 60-02.1-30 (emphasis added). It is undisputed that Mitchell Feeds is an insolvent licensee and that the Farmers are unpaid receiptholders of Mitchell Feeds. The sunflower inventory that was held by Mitchell Feeds is “[n]onwarehouse receipt grain of the insolvent licensee held in storage.”

The Bank’s assertion that the grain cannot become part of the trust because Mitchell Feeds transported it to storage bins in Minnesota is also erroneous. “[B]ecause the purpose of the trust fund is to insure that farmers storing or selling grain in an insolvent warehouse receive payment for that grain to the fullest extent possible, assets of the insolvent warehousemen should be considered “grain” includable in the trust fund ‘whenever reasonable.’” N. Dakota Pub. Serv. Comm'n v. Valley Farmers Bean Ass'n, 365 N.W.2d 528, 539 (N.D. 1985), (citing State ex rel. Public Service Commission v. R.F. Gunkelman & Sons, Inc., 219 N.W.2d 853, 859 (N.D.1974)).

The property right established in unpaid receipt holders by virtue of the North Dakota insolvency statutes cannot be defeated by transporting the grain to another state. See Healy-Owen-Hartzell Co. v. Merricourt Equity Exch., 164 Minn. 1, 4, 204 N.W. 527, 528 (1925) (“That is not giving to a foreign statute extraterritorial effect. It is recognizing something, recognition of which comity always compels, a property right given by the laws of another state, not contrary to the policy of our own, one attached to personal property when removed from that state to this. . . . That right and the resulting obligations attended the grain upon its transportation into Minnesota and take precedence over the equity of a general creditor proceeding here by attachment.”)

The Bank cites to only two cases, Public Service Commission v. Sustainable Systems, LLC dba Montla, Civ. No. 08-09-C-1034 (Burleigh County, ND 2009) and PSC v. Minnesota Grain, Inc., ND 2008 184, 756 N.W.2d 763, to support its proposition that the PSC does not have jurisdiction over the sunflowers and that they are not part of the trust corpus. Neither case cited by the Bank stands for such proposition and the factual circumstances of each are markedly different from this case. In Sustainable Systems, the company was licensed as a roving grain buyer in North Dakota and also operated a crushing facility that was located in and licensed in Montana. The PSC cooperated with the Montana Department of Agriculture to distribute the assets of Sustainable Systems, including the assets from the licensed Montana facility to the North Dakota claimants, therefore eliminating the need for them to exercise jurisdiction over the facility. Each farmer was compensated in full after receiving the assets distributed by the Montana Department of Agriculture and the proceeds from the bond. It does not follow from these facts that the PSC could not exercise jurisdiction over the grain located in Montana.

Minnesota Grain is also inapposite. In Minnesota Grain, the court determined that the claimant farmer could not share in the statutory trust proceeds because he sold his grain to

Minnesota Grain's East Grand Forks facility, which was licensed in Minnesota, rather than the Rhame, North Dakota facility, which was licensed and bonded in North Dakota. This case does not involve an elevator that was licensed and regulated by another state, and Sustainable Systems and Minnesota Grain do not provide support for the conclusion that the PSC may not exercise jurisdiction over the sunflowers held by Mitchell Feeds, a roving grain buyer licensed in North Dakota.⁶

A. American Federal Bank's Purported Lien Does Not Defeat the Trust Provisions of N.D.C.C. § 60-02.1-30.

Although the Bank does not disagree that the "PSC may be within its power to establish a trust on behalf of receipt holders of a roving grain buyer," it nonetheless claims that those receipt holders "do not have priority over secured creditors." See Exhibit C (Letter from Attorney for American Federal Bank Tracy Kennedy to North Dakota PSC). Based on its claim with the PSC, it appears that the Bank believes its security interest in the inventory of Mitchell Feeds defeats the trust provisions of N.D.C.C. § 60-02.1-30. The Bank is mistaken, and this issue has already been resolved in prior insolvency actions.

In its claim to the PSC, the Bank asserts that "[w]hile Chapter 60-02 gives receipt holders a priority claim over all secured creditors, it only applies to receipt holders of warehouses and warehousemen." See Exhibit C. The Bank's argument fails to recognize that N.D.C.C. § 60-02-25.1, relating to a receipt holder's lien, was a codification of an implied lien, which is and always has been a part of the trust provisions of the insolvency statutes.

In N.D. Pub. Serv. Comm'n v. Valley Farmers Bean Ass'n ("Valley Farmers Bean"), the Supreme Court of North Dakota addressed a very similar situation where several banks attempted to defeat the farmers' claims to the insolvent elevator's bean inventory based on the

⁶ Not only are both cases distinguishable from this case, Sustainable Systems also does not provide controlling authority in the matter.

banks' security interests in the elevator's inventory. 365 N.W.2d 528, 539 (N.D. 1985). The Court recognized that under the insolvency laws, a bank or other secured creditor had no claim to grain held for storage.

Likewise, we do not believe the Legislature intended that the trust provisions of § 60-04-02, N.D.C.C., could be defeated by a lender taking a security interest in an insolvent grain warehouseman's inventory. The purpose of Chapter 60-04, N.D.C.C., is to aid receipt holders in redeeming their receipts for as close to their full value as possible. Construing this legislation "with a view to effecting its objects and to promoting justice" [§ 1-02-01, N.D.C.C.], we conclude that the valid receipt holders had priority over the Banks to VFBA's inventory.

Id. at 540 (N.D. 1985). See also Millers Nat. Ins. Co. v. Commercial Credit Business Loans, Inc., 893 F.2d 165, 167 (8th Cir. 1990) (discussing Valley Farmers Bean, "the North Dakota Supreme Court declared that the interests of warehouse receipt holders (growers) took priority over the security interests of financial lenders in order to effectuate the purpose of the trust statute, protection of the growers."). It is crucial to recognize that this case was decided while N.D.C.C. § 60-02-25.1 was being considered by North Dakota's Forty-ninth Legislative Assembly (and therefore was not enacted law at the time Valley Farmers Bean was decided). The Court in Valley Farmers Bean relied upon *the insolvency statutes*, and the trust funds created by those statutes, to decide the issue of whether a secured creditor could defeat the trust provisions of North Dakota insolvency statutes. The Court specifically did *not* rely on N.D.C.C. § 60-02-25.1.

As the Court stated in Valley Farmers Bean, "[u]pon the insolvency of a grain warehouseman, a trust fund consisting of '[a]ll the grain in said warehouse' is established for the redemption of outstanding receipts.... [B]ecause the purpose of the trust fund is to insure that farmers storing or selling grain in an insolvent warehouse receive payment for that grain to the

fullest extent possible, assets of the insolvent warehouseman should be considered 'grain' includable in the trust fund 'whenever reasonable.'" Valley Farmers Bean, 365 N.W.2d at 539. Significantly, the language relied on here is that found at N.D.C.C. § 60-04-03.1. The full language of this provision is as follows:

Upon the insolvency of any warehouseman, a trust fund shall be established for the benefit of noncredit-sale receipt holders of the insolvent warehouseman and to pay the costs incurred by the commission in the administration of this chapter. The trust fund must consist of the following:

1. The grain in the warehouse of the insolvent warehouseman or the proceeds as obtained through the sale of such grain.

N.D.C.C. § 60-04-03.1. Because the Court was relying on this language, and doing so *prior* to enactment of N.D.C.C. § 60-02-25.1, it is important to compare this language to the trust provisions contained in the insolvency provisions for roving grain buyers. Those provisions are as follows:

Upon the insolvency of any licensee, a trust fund must be established for the benefit of noncredit-sale receipt holders and to pay the costs incurred by the commission in the administration of the insolvency. The trust fund must consist of the following:

1. Nonwarehouse receipt grain of the insolvent licensee held in storage or the proceeds obtained from the conversion of such grain.

N.D.C.C. § 60-02.1-30. The reasoning of the court in Valley Farmers Bean was based upon the trust provisions of the laws pertinent to grain warehousemen. The trust provisions pertinent to roving grain buyers are almost identical, and the purpose of these provisions *is* the same: "The law was intended for the benefit of the claimants, and must be construed with sufficient liberality to effectuate its purpose without doing injury to those who are liable." State v. Hoover Grain Co., 248 N.W. 275, 278 (N.D. 1933). "The rationale from Valley Farmers was the protection of growers" Millers Nat. Ins. Co., 893 F.2d at 167.

As referenced in Valley Farmers Bean, the Fifth Circuit Court of Appeals analyzed a similar situation in In re Gotham Provision Co., Inc., 669 F.2d 1000 (5th Cir. 1982) (“Gotham”). The Gotham case related to the provisions of the Packers and Stockyards Act of 1921, 7 U.S.C. § 181 *et seq.*

In [the Gotham case], a bank entered into a financing arrangement with Gotham whereby the bank would advance funds and take as collateral a security interest in Gotham's inventories, accounts receivable, and proceeds from the sale of meat. Gotham filed for bankruptcy, leaving a substantial loan balance due to the bank. Several livestock producers who had made cash sales to Gotham had not been paid. An escrow fund was created for the collection of Gotham's accounts receivable. The livestock producers claimed that their interest in the escrow fund was superior to that of the bank.

N.D. Pub. Serv. Comm'n v. Valley Farmers Bean Ass'n, 365 N.W.2d 528, 539-40 (N.D. 1985) (citing Gotham). The court in Gotham noted that “[t]he second major argument advanced by the Bank is that even if the appellees are cash sellers, the trust provisions of the Packers and Stockyards Act should not be construed to give the cash sellers a superior interest in Gotham's accounts receivable as against the Bank.” Gotham, 669 F.2d at 1008. The Gotham court found the statements of the principal sponsor of the 1976 amendments to the Packers and Stockyards Act very elucidating. Id. at 1009. Rep. Thone, during the House debates, explained:

What are the arguments for the trust? First we have the simple answer of equitable treatment. How can one argue that a packer should be able to commit property as collateral for a loan, in this particular case livestock, for which he has not paid and does not actually own, to a third party, and then allow the third party to stand ahead of the producers if the packer fails?

Again some would argue that by having the bond and the prompt pay and the solvency test, why do we need this trust provision? The answer is that the trust provision will help prevent a packer from giving a priority to subsequent secured creditors, over the

livestock producer who has not been paid. The trust is the only provision here that gives any help to the farmer.

Gotham, 669 F.2d at 1009 (citing 122 Cong.Rec. 12864 (May 6, 1976)). The Gotham court agreed with Rep. Thone, stating,

[W]e believe that if a lender could defeat the s 206 trust merely by taking a security interest in inventories and receivables, the clear intention of Congress would be thwarted and the trust provision of the Act would be reduced to a nullity.... Where the packer has given a lender a security interest in inventories or receivables that are subject to the s 206 trust, the unpaid cash sellers have priority over those assets and may recover the proceeds of those receivables to the extent of the outstanding balance on the cash sales. In this case, the appellees are entitled to the collections of the receivables held in escrow, and the Bank must return to the appellees from the payments on the accounts receivable....

In re Gotham Provision Co., Inc., 669 F.2d 1000, 1009-10 (5th Cir. 1982).

It is crucial to note that the court in Gotham had no need to resort to any explicit statutorily created liens to rule as it did. The fact the Congress had created a trust with the intent of protecting cash sellers from the insolvency of the facilities that bought the producers' product was sufficient for the court to find that a lender taking a security interest in the inventory of such a facility cannot defeat the trust by claiming a priority interest.

There is no distinction between outstanding receiptholders of a warehouse and those of a roving grain buyer which would limit the application of the priority lien status to one and not the other. The Bank asserts that because "[t]he Farmers in this case **SOLD** the grain to Mitchell Feeds, there was no bailment relationship created" and asserts that the lack of a bailment relationship defeats the Farmers claim that the receiptholder's lien applies to their interests in Mitchell Feeds inventory. Bank's Brief, p. 27. The Bank's reliance on the existence of a bailment relationship is misplaced, however. The Bank ignores the broad language of N.D.C.C. § 60-02-25.1, which provides:

Grain contained in a warehouse, including grain owned by the warehouseman, is subject to a first priority lien in favor of outstanding receipt holders storing, selling, or depositing grain in the warehouse. The lien created under this section shall be preferred to any lien or security interest in favor of any creditor of the warehouseman regardless of the time when the creditor's lien or security interest attached to the grain. Notice of the lien created under this section need not be filed in order to perfect the lien. The lien created by this section is discharged as to grain sold by the warehouseman to a buyer in the ordinary course of business. Such sale does not discharge the lien in favor of an individual receipt holder in the remaining grain in the warehouse.

It is obvious that the application of the first priority lien in favor of receipt holders is not contingent upon their status as bailors. In fact, there would be no need for a lien in the instance of a bailor-bailee relationship as against a secured creditor of the licensee because the farmer in that situation is still the title holder of the grain and would be entitled to its return. "Clearly a secured creditor's security interest does not attach until the warehouseman-bailee has rights in the goods. . . This interest never arises in bailed property." In re Woods Farmers Co-op. Elevator Co., 107 B.R. 678, 683 (Bankr. D.N.D. 1989).

Regardless, the sweeping language of the provision demonstrates the intent to compensate all farmers, regardless of their relationship with the licensee, and includes receipt holders who have **SOLD** their grain to the licensee. The statute does not distinguish between grain held in storage for bailment purposes and that owned by the warehouse, and specifically provides that grain owned by the licensee is also encumbered to satisfy the claims of all those who store, sell, or deposit grain with the licensee. See, Valley Farmers Bean, 365 N.W.2d at 540 ("We conclude that the trust fund consists of not only the type and quality of grain represented by claims filed by producers, but all of the grain remaining in the warehouse at the time of insolvency."); see also, In re Woods Farmers Co-op Elevator Co., 107 B.R. 678 (Bankr. D.N.D.1989) ("Even if the bank's security interest attaches to excess goods of a

particular commodity type, it still stands second in priority to the blanket lien given warehouse receipt holders by section N.D.C.C. § 60-02-25.1); N. Dakota Pub. Serv. Comm'n v. Cent. States Grain, Inc., 371 N.W.2d 767, 779 (N.D. 1985) (“We believe it to be beyond dispute that one of a warehouseman's duties under the law is to pay for the grain that it has purchased. We conclude that the trust fund exists for the benefit of all unpaid sellers of grain regardless of whether they hold “cash slips” or “checks”. . .). The Bank’s claims that the Farmers are not the type of receiptholders anticipated within the receiptholder’s lien provision is without merit.

D. The Farmers Claims Are Not Barred by a Failure to Exhaust Administrative Remedies.

The Bank asserts that the Farmers have failed to exhaust their administrative remedies and are therefore barred from bringing an action for declaratory judgment. The doctrine of exhaustion of remedies does not apply and the Bank’s claims are meritless.

The PSC’s development of a report under N.D.C.C. § 60-02.1-37, and any subsequent objection, are not administrative remedies that must be exhausted. c.f. Valley Farmers Bean, 365 N.W.2d at 536 (The Banks asserted that the PSC was required to marshal all assets of the trust fund prior to determining who was entitled to the proceeds; the court denied the Banks’ claims and ruled that the statute “does not clearly set forth a specific procedure to be used in administering the trust.”). The Valley Farmers Bean case squarely addressed this issue and resolved it, and the Bank’s argument is meritless.

The doctrine of exhaustion of remedies requires that a party pursue all remedies and appeals through the administrative process prior to seeking relief with the court. “The purpose of requiring exhaustion of remedies has its basis in the separation of powers doctrine.” Brown v. State ex rel. State Bd. of Higher Educ., 2006 ND 60, 711 N.W.2d 194, 198. The doctrine applies to situations in which there is an independent administrative process, typically involving an administrative hearing and order from which the aggrieved party may appeal to the district court.

It does not apply where a statutory procedure is contained within the judicial proceedings which happen to involve an administrative agency.

An exhaustion of remedies requirement serves the salutary function of eliminating or mitigating damages. If an organization is given the opportunity quickly to determine through the operation of its internal procedures that it has committed error, it may be able to minimize, and sometimes eliminate, any monetary injury to the plaintiff by immediately reversing its initial decision and affording the aggrieved party all membership rights; an individual should not be permitted to increase damages by foregoing available internal remedies....

Soentgen v. Quain & Ramstad Clinic, P.C., 467 N.W.2d 73, 82 (N.D. 1991). Soentgen v. Quain & Ramstad Clinic, P.C., 467 N.W.2d 73, 82 (N.D. 1991) (“If the complaining party prevails before the administrative agency or the hospital board, judicial proceedings would have been unnecessary and the court would have intervened needlessly.”). The prohibition against bifurcated procedures or duplicative proceedings does not apply where the administrative proceeding and judicial proceeding are one and the same. This is especially pronounced when one considers that any objections to the PSC’s report would be determined by this court, and would not be an administrative adjudication.

Furthermore, even if the PSC’s process of completing and presenting its report to the court was considered an administrative remedy which must be exhausted, such exhaustion would be futile in this case. “Exhaustion of remedies is not required if exhaustion would be futile.” Frank v. Traynor, 1999 ND 183, 600 N.W.2d 516, 520. Completing the report procedure provided for in the statute will not eliminate or mitigate the damages of any party in this case or eliminate the need for judicial proceedings. Regardless of whether the PSC includes the sunflowers or sunflower proceeds or not, there is obviously a party that will object to its determination and the question will be before this court once again. If the PSC does not include them, the Farmers will object and request a decision from the court, if the PSC does include

them, it is a certainty that the Bank will object. Requiring the Bank to adopt a report prior to confirming that the sunflowers are part of the trust does not comport with the purpose behind the doctrine of exhaustion of remedies and does not promote administrative and judicial efficiency.

The Bank also argues that a decision regarding whether the sunflowers or sunflower proceeds are properly contained within statutory trust prior to the PSC's filing of its report would amount to an advisory opinion. This conclusion is also erroneous. The prohibition of advisory opinions requires that there be an "actual controversy to be determined" before a court can properly adjudicate. Sposato v. Sposato, 1997 ND 207, ¶ 8, 570 N.W.2d 212. The Bank does not argue that there is an absence of an actual controversy at issue in this case or that the question is "moot, abstract, theoretical, academic, hypothetical or speculative;" to the contrary, it vehemently asserts that the Farmers' and the PSC's claims to the sunflowers or sunflower proceeds are inferior to its claims. Aberle v. Karn, 316 N.W.2d 779 (N.D. 1982). Instead, it appears to assert that only the PSC can decide the proper recipient of the sunflowers and may not seek the court's guidance in doing so, because such decision would be an "advisory opinion." The Bank's arguments do not support its conclusions and there is clearly a justiciable controversy in this action crying out for resolution.

IV. CONCLUSION

The Bank's claims in the Minnesota action were improper and should not have been decided, and will almost certainly be reversed on appeal. The sunflower proceeds are also a part of the trust being administered in this insolvency action by the PSC, and the Farmers' have a right to declaratory relief toward that end. Based on the foregoing arguments, the Farmers respectfully request that this Court deny the Bank's Motion for Summary Judgment or delay a

determination on the Bank's Motion until the exhaustion of the appellate process in the Minnesota action.

Signed this 13th day of June, 2012.

BAUMSTARK BRAATEN LAW PARTNERS

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/s/ Derrick Braaten

Derrick Braaten (ID 06394)

Lindsey Nieuwsma (ID 06857)

STATE OF NORTH DAKOTA
COUNTY OF BURLEIGH

IN DISTRICT COURT
SOUTH CENTRAL JUDICIAL DISTRICT

Public Service Commission,)
)
 Plaintiff,)
 v.)
)
 Mitchell Feeds, Inc. and Western Surety)
 Company,)
)
 Respondents,)
)
 Micheal Aasen, Donald Ackerson, Sheldon)
 Ackerson, Lana Anderson d/b/a Northland)
 Farms, B & D Farms, Inc., Busch Farms, Inc.,)
 David Deslauriers, Scott Lazorenko, Manna)
 Farms, Inc., Nathan Neameyer, Steven)
 Neameyer, Mitch Preskey, Paul Rohde, James)
 Routledge, Bart Savelkoul d/b/a Savelkoul)
 Farms, Mike Schollmeyer, David Steeves,)
 Robert Steeves, Paul Trout, Wurgler Farms,)
 and Kelly Wurgler,)
)
 and)
)
 American Federal Bank,)
)
 Intervenor.)

Civil No. 08-2011-CV-917
PSC Case No. GE-11-051

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing

- **Intervenor Farmers' Response to Intervenor American Federal Bank's Motion for Summary Judgment**

was on June 13, 2012, electronically filed with the court and delivered via email and US Mail to the following:

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/s/ Lindsey Nieuwsma
Lindsey Nieuwsma

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF NORMAN

NINTH JUDICIAL DISTRICT

Don Ackerson, Lana Anderson d/b/a
Northland Farms, Mike Aasen, David
Deslauriers, Jeff Kling, Scott Lazorenko,
Nathan Neameyer, Steven Neameyer, Ron
Pelton, Mitch Preskey, James Routledge, Bart
Savelkoul, Mike Schollmeyer, Shane Sickler,
David Steeves, Paul Trout, Wurgler Farms,
and Kelly Wurgler,

Plaintiffs,

vs.

Mitchell Feeds, Inc. and Mitchell Farms, Inc.,

Defendants.

vs.

American Federal Bank,

Intervenor,

RECEIVED
DEC 19 2011

BY:.....

Civil No. CV 11-112

COMPLAINT IN
INTERVENTION

Intervenor, American Federal Bank ("American Federal") for its causes of action against Defendants Mitchell Feeds, Inc. and all other interested parties, including Plaintiffs named in the [Proposed First Amended] Complaint, presuming it is accepted by the Court, Michael Aasen, Donald Ackerson, Sheldon Ackerson, Lana Anderson d/b/a Northland Farms, B& D Farms, Inc., Busch Farms, Inc., David DesLauriers, Scott Lazorenko, Manna Farms, Inc., Nathan Neameyer, Steven Neameyer, Mitch Preskey, Paul Rohde, James Routledge, Bart Savelkoul d/b/a Savelkoul



Farms, Mike Schollmeyer, David Steeves, Robert Steeves, Paul Trout, Wurgler Farms, and Kelly Wurgler, states and alleges as follows:

THE PARTIES

1. Intervenor American Federal Bank is a federally chartered bank with its principal place of business at 215 North Fifth Street, Fargo, ND 58102.

2. Plaintiff Micheal Aasen is a farmer and resident of North Dakota, and his address is 4465 Co. Rd. 2, Sherwood, ND 58782.

3. Plaintiff Don Ackerson and Sheldon Ackerson are a farmers and residents of North Dakota, and their address is 5175 106th St. NW, Sherwood, ND 58782.

4. Plaintiff Lana Anderson, d/b/a Northland Farms, is a farmer and resident of North Dakota, and her address is 10845 53rd Ave. NW, Sherwood ND 58782.

5. Plaintiff B&D Farms, Inc. is a North Dakota farm corporation and its address is 3551 County Road 2, Sherwood, ND 58782. Jan Kostad is the registered agent. Brent Keith is the owner of B&D Farms.

6. Plaintiff Busch Farms, Inc. is a North Dakota farming corporation and its address is 309 2nd St. NW, Crosby, ND 58730. Gregory F. Busch is the registered agent.

7. Plaintiff David Deslauriers is a farmer and resident of North Dakota, and his address is 4915 Co. Rd. 2, Sherwood, ND 58782.

8. Plaintiff Scott Lazorenko is a farmer and resident of North Dakota, and his address is 899 Brew St., Killdeer, ND 58640.

9. Plaintiff Manna Farms, Inc. is a North Dakota farm corporation, and its address is 3755 County Road 2, Sherwood, ND 58782. Arlyn Keith is the registered agent.

10. Plaintiff Nathan Neameyer is a farmer and resident of North Dakota, and his address is 614 9th Ave. NE, Rolla, ND 58367.

11. Plaintiff Steven Neameyer is a farmer and resident of North Dakota, and his address is HC1 Box 44, Mylo, ND 58353.

12. Plaintiff Mitch Preskey is a farmer and resident of North Dakota, and his address is 2485 Glenburn Rd, Glenburn, ND 58740.

13. Plaintiff Paul Rohde is a farmer and a resident of North Dakota, and his address is P.O. Box 251, Halliday, ND 58636.

14. Plaintiff James Routledge is a farmer and resident of North Dakota, and his address is 603 Bavaria Dr., Minot, ND 58703.

15. Plaintiff Bart Savelkoul is a farmer and resident of North Dakota, and his address is 8221 30th Ave. NW, Lansford, ND 58750.

16. Plaintiff Mike Schollmeyer is a farmer and resident of North Dakota, and his address is 549 101st Ave. SW, Dunn Center, ND 58626.

17. Plaintiff David Steeves is a farmer and resident of North Dakota, and his address is 4690 Cty Rd 2, Sherwood, ND 58782.

18. Plaintiff Robert Steeves is a farmer and resident of North Dakota, and his address is 227 3rd Ave. E, Sherwood, ND 58782.

19. Plaintiff Paul Trout is a farmer and resident of North Dakota, and his address is 10285 Hwy 28, Sherwood, ND 58782.

20. Plaintiff Wurgler Farms is a farming partnership and its address is 1600 Parkside Drive, Minot, ND 58701.

21. Plaintiff Kelly Wurgler is a farmer and resident of North Dakota, and his address is 1600 Parkside Dr., Minot, ND 58701.

22. Defendant Mitchell Feeds, Inc. is a Minnesota corporation created on January 10, 2006 with an address of 154 Hwy 75 S, Hendrum, MN 56550. Robert Mitchell is the registered agent.

23. Defendant Mitchell Feeds, Inc. was also registered as a foreign corporation in North Dakota on September 21, 2009. Defendant Mitchell Feeds, Inc. is a buyer of sunflowers and grain products with its principal office located at 154 Hwy 75 S, Hendrum, MN 56550. Jackie Mitchell is the registered agent for North Dakota with an address of 4905 County Hwy 81 S, Horace, ND 58047.

FACTUAL ALLEGATIONS

24. On or about February 24, 2010, Intervenor American Federal Bank ("American Federal") entered into a Security Agreement (the "Security Agreement") with Defendant Mitchell Feeds, Inc. ("Mitchell Feeds") and BJM Land, Inc. A true and correct copy of the Security Agreement is attached hereto as "Exhibit A."

25. The Security Agreement was given to secure payment of a Promissory Note given by Defendant Mitchell Feeds, Inc. and BJM Land, Inc. in favor of Intervenor American Federal. A true and correct copy of the Promissory Note is attached hereto as "Exhibit B." The Security Agreement granted Intervenor American Federal a security interest in collateral:

The word "Collateral" as used in this Agreement means the following described property, whether now owned or hereafter acquired, whether now existing or hereafter arising, and wherever located:

All Fixtures, All Inventory, Chattel Paper, Accounts, Equipment including but not limited to attached "Exhibit A" [attached to the Security Agreement], and General Intangibles.

In addition, the word "Collateral" also includes all the following, whether now owned or hereafter acquired, whether now existing or hereafter arising, and wherever located:

(A) All accessions, attachments, accessories, tools, parts, supplies, replacements of and additions to any of the collateral described herein, whether added now or later.

(B) All products and produce of any of the property described in this Collateral section.

(C) All accounts, general intangibles, instruments, rents, monies, payments, and all other rights, arising out of a sale, lease, consignment or other disposition of any of the property described in this Collateral section.

(D) All proceeds (including insurance proceeds) from the sale, destruction, loss, or other disposition of any of the property described in this Collateral section, and sums due from a third party who has damaged or destroyed the Collateral or from that party's insurer, whether due to judgment, settlement or other process.

(E) All records and data relating to any of the property described in this Collateral section, whether in the form of a writing, photograph, microfilm, microfiche, or electronic media, together with all of Grantor's right, title, and interest in and to all computer software required to utilize, create, maintain, and process any such records or data on electronic media.

Some or all of the Collateral may be located on the real estate described in the attachment to the Security Agreement.

26. Intervenor American Federal filed its UCC-1 Financing Statement on Defendant Mitchell Feeds, Inc. with the Minnesota Secretary of State's office on March 1, 2010. A true and correct copy of the UCC-1 Financing Statement is attached hereto as "Exhibit C."

27. The Security Agreement delineates what is to be considered a default of the agreement and warranties Intervenor American Federal shall have in the event of a of a default. Those default terms are remedies include, but are not limited to, the following:

DEFAULT. Each of the following shall constitute an Event of Default under this Agreement:

Payment Default. Grantor fails to make any payment when due under the Indebtedness.

Other Defaults. Grantor fails to comply with or to perform any other term, obligation, covenant or condition contained in this Agreement or in any of the Related Documents or to comply with or to perform any term, obligation, covenant or condition contained in any other agreement between Lender and Grantor.

...

RIGHTS AND REMEDIES ON DEFAULT. If an Event of Default occurs under this Agreement, at any time thereafter, Lender shall have all the rights of a secured party under the Minnesota Uniform Commercial Code. In addition and without limitation, Lender may exercise any one or more of the following rights and remedies:

Accelerate Indebtedness. Lender may declare the entire Indebtedness, including any prepayment penalty which Grantor would be required to pay, immediately due and payable, without notice of any kind to Grantor.

Assemble Collateral. Lender may require Grantor to deliver to Lender all or any portion of the Collateral and any and all certificates of title and other documents relating to the Collateral. Lender may require Grantor to assemble the Collateral and make it available to Lender at a place to be designated by Lender. Lender also shall have full power to enter upon the property of Grantor to take possession of and remove the Collateral. If the Collateral contains other goods not covered by this Agreement at the time of repossession, Grantor agrees Lender may take such other goods, provided that Lender makes reasonable efforts to return them to Grantor after repossession.

Sell the Collateral. Lender shall have full power to sell, lease, transfer, or otherwise deal with the Collateral or proceeds thereof in Lender's own name or that of Grantor. Lender may sell the Collateral at public auction or private sale. Unless the Collateral threatens to decline speedily in value or is of a type customarily sold on a recognized market, Lender will give Grantor, and other persons as required by law, reasonable notice of the time and place of any public sale, or the time after which any private sale or any other disposition of the Collateral is to be made. However, no notice need be provided to any person who, after Event of Default occurs, enters into and authenticates an agreement waiving that person's right to notification of sale. The requirements of reasonable notice shall be met if such notice is given at least ten (10) days before the time of the sale or disposition. All expenses relating to the disposition of the Collateral, including without limitation the expenses of retaking, holding, insuring, preparing for sale and selling the Collateral,

shall become a part of the Indebtedness secured by this Agreement and shall be payable on demand, with interest at the Note rate from date of expenditure until repaid.

Appoint Receiver. Lender shall have the right to have a receiver appointed to take possession of all or any part of the Collateral, with the power to protect and preserve the Collateral, to operate the Collateral preceding foreclosure or sale, and to collect the Rents from the Collateral and apply the proceeds, over and above the cost of the receivership, against the Indebtedness. The receiver may serve without bond if permitted by law. Lender's right to the appointment of a receiver shall exist whether or not the apparent value of the Collateral exceeds the Indebtedness by a substantial amount. Employment by Lender shall not disqualify a person from serving as a receiver.

Collect Revenues, Apply Accounts. Lender, either itself or through a receiver, may collect the payments, rents, income, and revenues from the Collateral. Lender may at any time in Lender's discretion transfer any Collateral into Lender's own name or that of Lender's nominee and receive the payments, rents, income, and revenues therefrom and hold the same as security for the Indebtedness or apply it to payment of the Indebtedness in such order of preference as Lender may determine. Insofar as the Collateral consists of accounts, general intangibles, insurance policies, instruments, chattel paper, choses in action, or similar property, Lender may demand, collect, receipt for, settle, compromise, adjust, sue for, foreclose, or realize on the Collateral as Lender may determine, whether or not Indebtedness or Collateral is then due. For these purposes, Lender may, on behalf of and in the name of Grantor, receive, open and dispose of mail addressed to Grantor; change any address to which mail and payments are to be sent; and endorse notes, checks, drafts, money orders, documents of title, instruments and items pertaining to payment, shipment, or storage of any Collateral. To facilitate collection, Lender may notify account debtors and obligors on any Collateral to make payments directly to Lender.

Obtain Deficiency. If Lender chooses to sell any or all of the Collateral, Lender may obtain a judgment against Grantor for any deficiency remaining on the Indebtedness due to Lender after application of all amounts received from the exercise of the rights provided in this Agreement. Grantor shall be liable for a deficiency even if the transaction described in this subsection is a sale of accounts or chattel paper.

Other Rights and Remedies. Lender shall have all the rights and remedies of a secured creditor under the provisions of the Uniform Commercial Code, as may be amended from time to time. In addition, Lender shall have and may exercise any or all other rights and remedies it may have available at law, in equity, or otherwise.

Election of Remedies. Except as may be prohibited by applicable law, all of Lender's rights and remedies, whether evidenced by this Agreement, the

Related Documents, or by any other writing, shall be cumulative and may be exercised singularly or concurrently. Election by Lender to pursue any remedy shall not exclude pursuit of any other remedy, and an election to make expenditures or to take action to perform an obligation of Grantor under this Agreement, after Grantor's failure to perform, shall not affect Lender's right to declare a default and exercise its remedies.

28. Defendant Mitchell Feeds, Inc. and BJM Land, Inc. are currently in default of the Promissory Note for failure to make payment when due and because of other creditor proceedings.

29. The amount due on the Note is the principal sum of \$859,223.45, plus late charges of \$1,618.05, accrued interest through July 14, 2011 in the amount of \$9,153.12 (based on the 6.50% interest rate set forth in the promissory note), per day interest after the aforesaid date in the amount of \$155.14 until the promissory note is fully paid.

30. Plaintiffs are farmers or farming businesses who produce sunflowers.

31. Defendant Mitchell Feeds, Inc. purchased Plaintiffs 2008 and/or 2009 sunflower crops through contracts entered into with Plaintiffs either individually or as a business.

32. Plaintiffs received no payment or partial payment on their contracts to sell their sunflower crops to Defendant Mitchell Feeds, Inc.

33. Plaintiffs claim that they have a right to possession of Defendant Mitchell Feeds, Inc.'s sunflower inventory and/or the proceeds thereof.

COUNT ONE – SECURITY AGREEMENT

34. Paragraphs 1 through 33 above are restated herein.

35. On or about February 24, 2010, Defendant Mitchell Feeds, Inc. and BJM Land, Inc. executed and delivered to Intervenor American Federal a Security Agreement.

36. The Security Agreement is perfected with a filed UCC-1 financing statement filed with the Minnesota Secretary of State's Office of March 1, 2010.

37. The Security Agreement describes as collateral the following described property:

The word "Collateral" as used in this Agreement means the following described property, whether now owned or hereafter acquired, whether now existing or hereafter arising, and wherever located:

All Fixtures, All Inventory, Chattel Paper, Accounts, Equipment including but not limited to attached "Exhibit A" [attached to the Security Agreement], and General Intangibles.

In addition, the word "Collateral" also includes all the following, whether now owned or hereafter acquired, whether now existing or hereafter arising, and wherever located:

(F) All accessions, attachments, accessories, tools, parts, supplies, replacements of and additions to any of the collateral described herein, whether added now or later.

(G) All products and produce of any of the property described in this Collateral section.

(H) All accounts, general intangibles, instruments, rents, monies, payments, and all other rights, arising out of a sale, lease, consignment or other disposition of any of the property described in this Collateral section.

(I) All proceeds (including insurance proceeds) from the sale, destruction, loss, or other disposition of any of the property described in this Collateral section, and sums due from a third party who has damaged or destroyed the Collateral or from that party's insurer, whether due to judgment, settlement or other process.

(J) All records and data relating to any of the property described in this Collateral section, whether in the form of a writing, photograph, microfilm, microfiche, or electronic media, together with all of Grantor's right, title, and interest in and to all computer software required to utilize, create, maintain, and process any such records or data on electronic media.

Some or all of the Collateral may be located on the real estate described in the attachment to Exhibit A.

38. The Security Agreement is in default by reason of Defendant Mitchell Feeds, Inc.'s failure to pay the Promissory Note secured by the Security Agreement and pursuant to Minnesota Statutes Annotated § 336.9-201 (UCC 9-201) providing that a security agreement is effective according to its terms between the parties.

39. Because of the default, Intervenor American Federal has the right to exercise its remedies under the Security Agreement and/or under the Uniform Commercial Code and other applicable laws of the State of Minnesota, and these remedies include but are not limited to the right of Intervenor American Federal to take possession of the secured collateral and sell or otherwise dispose of same with application of the proceeds of sale or disposition to be applied against the expenses of taking the collateral and readying it for sale, and then against the debt owed by Defendant to Plaintiff, pursuant to Minnesota Statutes Annotated §§ 336.9-601 through 336.9-628 (UCC 9-601 through 9-628), providing for procedure on default, collection rights of secured party, secured party's right to take possession after default, and secured party's right to sell or dispose of collateral and method of application of proceeds.

COUNT TWO - EMERGENCY REPOSSESSION RELIEF

40. Paragraphs 1 through 39 above are restated herein.

41. Plaintiff reserves its right in this action to seek an interim or emergency order for seizure of collateral prior to trial on the merits, if the circumstances so warrant, pursuant to Minnesota Statutes Annotated § 336.9-609 (UCC 9-609) permitting self-help or extra judicial seizure of collateral, Minnesota Statutes Annotated Ch. 565 (Claim and Delivery), or such other procedures as are available under Minnesota law for interim or emergency seizure of collateral pending final judgment on the merits.

**COUNT THREE – DETERMINATION OF PRIORITY
AND DECLARATORY JUDGMENT**

42. Paragraphs 1 through 41 above are restated herein.

43. Plaintiffs claim that Defendants Mitchell Feeds, Inc. and Mitchell Farms, Inc. wrongfully detained and withheld Plaintiffs' sunflowers and that Plaintiffs are entitled to the return of their property.

44. Intervenor American Federal claims a first priority security interest in the sunflower inventory of Defendant Mitchell Feeds, Inc. and the proceeds thereof.

45. There are competing claims in Defendant Mitchell Feeds' sunflower inventory and the proceeds thereof, and it must be determined who has priority to Defendant Mitchell Feeds' sunflower inventory and the proceeds thereof.

PRAYER FOR RELIEF

WHEREFORE, Intervenor American Federal Bank respectfully requests that the Court order the entry of judgment in favor of Intervenor American Federal Bank and against Plaintiffs and Defendant Mitchell Feeds, Inc. as follows:

1. On Count One, for a judgment against Defendant Mitchell Feeds, Inc. permitting Intervenor American Federal to take possession of all secured collateral, including the sunflower inventory and the proceeds thereof, with or without the aid of the Sheriff or other appropriate law enforcement authorities, and to dispose of same under the Uniform Commercial Code as enacted in North Dakota, with application of the net proceeds, after deduction for expenses of taking possession and sale or other disposition expenses, as a credit on the obligations owed to Intervenor American Federal by Defendant Mitchell Feeds, Inc.

2. On Count Two, for such emergency repossession relief as is warranted under the circumstances of this case, prior to trial on the merits.

3. On Count Three, a determination by the Court that Intervenor American Federal Bank has a first priority interest in Defendant Mitchell Feeds, Inc.'s sunflower inventory and the proceeds thereof superior to the claims of Plaintiffs.

4. Any and all other relief that the Court deems just and appropriate.

American Federal preserves its right to seek judgment against Defendant Mitchell Feeds, Inc. in this case or in a separate action pursuant to the terms of the other agreements between the parties, including the Promissory Note, Mortgages, and Guaranties.

Dated this 14 day of December, 2011.



TRACY A. KENNEDY (MN ID# 030105X)

For: Zimney Foster, P.C.
3100 South Columbia Road, Ste. 200
P.O. Box 13417
Grand Forks, ND 58201
Phone: 701.772.8111 Fax: 701.772.7328
Attorneys for Intervenor American Federal

ACKNOWLEDGEMENT

The undersigned hereby acknowledges that appropriate sanctions may be imposed against the parties and/or their attorneys' pursuant to Minnesota Statute §549.211 if the Court determines that the claims, defenses or other legal contentions contained herein are presented for an improper purpose, unwarranted by existing law, frivolously presented, without evidentiary support, not reasonably based upon knowledge, information and belief or made without reasonable inquiry under the circumstances.

Dated this 14 day of December, 2011.


Tracy A. Kennedy

STATE OF MINNESOTA
COUNTY OF NORMAN

DISTRICT COURT
NINTH JUDICIAL DISTRICT

Don Ackerson, Lana Anderson, d/b/a)
Northland Farms, Mike Aasen, David Deslauriers,)
Jeff Kling, Scott Lazorenko, Nathan Neameyer,)
Steve Neameyer, Ron Pelton, Mitch Preskey,)
James Routledge, Bart Savelkoul,)
Mike Schollmeyer, Shane Sickler, David Steeves,)
Paul Trout, Wurgler Farms, and Kelly Wurgler,)

Plaintiffs,)

vs.)

Mitchell Feeds, Inc., and Mitchell Farms, Inc.,)

Defendants,)

vs.)

American Federal Bank,)

Intervenor.)

Civil No. 54-CV-11-112

RECEIVED
JAN 19 2012

BY:.....

**ANSWER OF MITCHELL FEEDS, INC. TO COMPLAINT IN INTERVENTION
AND DEMAND FOR JURY TRIAL**

Defendant, Mitchell Feeds, Inc., ("Mitchell Feeds") named within the [Proposed First Amended] Complaint, if accepted by the Court, for its Answer to the Complaint in Intervention of Intervenor, American Federal Bank ("American Federal") by and through its undersigned counsel, hereby states and alleges as follows:

Mitchell Feeds denies each and every allegation contained in the Complaint in Intervention except that which is expressly admitted, qualified or explained.



THE PARTIES

1. For purposes of this proceeding, paragraph 1 of Complaint in Intervention is admitted.

2-23. Mitchell Feeds is without sufficient knowledge or information to form a belief as to the allegations in 2-23.

FACTUAL ALLEGATIONS

24. Mitchell Feeds admits the allegations contained in paragraph 24.

25. Paragraph 25 states a legal conclusion for which Mitchell Feeds is not required to provide a response and references a document which speaks for itself. To the extent that a response is required, Mitchell Feeds puts American Federal to strict proof with respect to the allegations made in paragraph 25.

26. Mitchell Feeds admits the allegations contained in paragraph 26.

27. Paragraph 27 states a legal conclusion for which Mitchell Feeds is not required to provide a response and references a document which speaks for itself. To the extent that a response is required, Mitchell Feeds put American Federal to strict proof with respect to the allegations made in paragraph 27.

28. Mitchell Feeds is without knowledge or information sufficient to form a belief as to the allegations in paragraph 28. American Federal needs to specify what payment(s) were not made when due and what it means by "other creditor proceedings."

29. Mitchell Feeds is without knowledge or information sufficient to form a belief as to the allegations in paragraph 29. American Federal needs to provide a full and complete accounting.

30. Mitchell Feeds is without knowledge or information sufficient to form a belief as to the allegations in paragraph 30.

31. Mitchell Feeds admits the allegations in paragraph 31.

32. Mitchell Feeds admits the allegations in paragraph 32.

33. Mitchell Feeds admits the allegations in paragraph 33.

COUNT ONE - SECURITY AGREEMENT

34. Mitchell Feeds denies all allegations in paragraph 34 not expressly admitted.

35. Mitchell Feeds admits the allegations in paragraph 35.

36. Paragraph 36 states a legal conclusion for which Mitchell Feeds is not required to provide a response and references a document which speaks for itself. To the extent that a response is required, Mitchell Feeds put American Federal to strict proof with respect to the allegations made in paragraph 36.

37. Paragraph 37 references a document which speaks for itself.

38. Paragraph 38 states a legal conclusion for which Mitchell Feeds is not required to provide a response. To the extent that a response is required, Mitchell Feeds put American Federal to strict proof with respect to the allegations made in paragraph 38.

39. Paragraph 39 states a legal conclusion for which Mitchell Feeds is not required to provide a response. To the extent that a response is required, Mitchell Feeds affirmatively states that by prior court order, the sunflower inventory is being sold and the proceeds are being deposited in an interest bearing account. Application of the net sale proceeds are subject to further court order.

COUNT TWO - EMERGENCY REPOSSESSION RELIEF

40. Mitchell Feeds denies all allegations in paragraph 40 not expressly admitted.

41. Paragraph 41 relates to repossession. Mitchell Feeds affirmatively states that pursuant to prior court order, the inventory is being sold and the proceeds, after expenses, are being deposited in an interest bearing account. Entitlement to those proceeds is subject to further court order.

**COUNT THREE - DETERMINATION OF PRIORITY AND DECLARATORY
JUDGMENT**

42. Mitchell Feeds denies all allegations in paragraph 42 not expressly admitted.

43. While paragraph 43 appears to be a summary of what Plaintiffs' claim, Mitchell Feeds specifically denies it wrongfully obtained and withheld any Plaintiffs' sunflowers and/or they are entitled to a return of their property.

44. Mitchell Feeds admits the allegations in paragraph 44.

45. Mitchell Feeds admits the allegations in paragraph 45.

PRAYER FOR RELIEF

WHEREFORE, Mitchell Feeds respectfully requests the following relief:

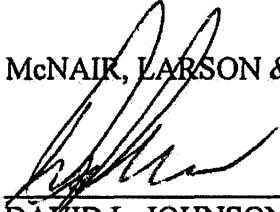
1. A determination by the Court who has a first priority interest in *Mitchell Feeds'* sunflower inventory and the proceeds thereof;
2. Any and all other relief that the Court deems just and appropriate.

Mitchell Feeds preserves all other claims or defenses with respect to American Federal seeking a money judgment against Mitchell Feeds in this case or in a separate action or pursuant to the terms of other agreements between the parties, including any promissory note, mortgages and guarantees.

Dated this 18th day of January, 2012.

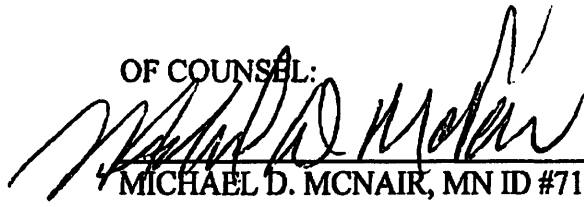
McNAIR, LARSON & CARLSON, LTD.

By:



DAVID L. JOHNSON, ND ID #3484
Attorneys for Defendants, Mitchell Feeds,
Inc., and Mitchell Farms, Inc.,
Suite 600, Dakota Center Building
51 Broadway
P. O. Box 2189
Fargo, ND 58108-2189
(701) 293-9190

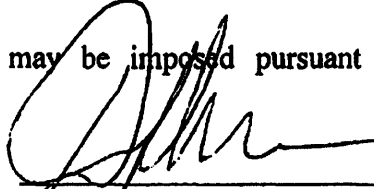
OF COUNSEL:



MICHAEL D. MCNAIR, MN ID #71304
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51 Broadway, Suite 600
Post Office Box 2189
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Telephone: (701) 293-9190

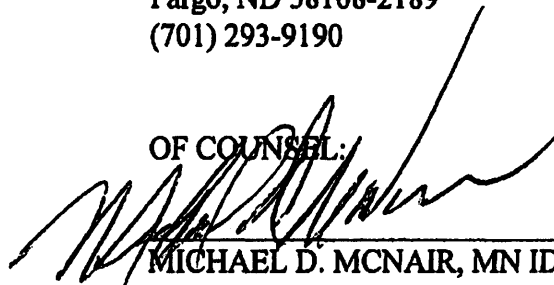
ACKNOWLEDGMENT

Defendants acknowledge that sanctions may be imposed pursuant to Minn. Stat. Section 549.211, subd. 3.



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John S. Foster
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Warren J. Roehl*
Bradley W. Parrish*
Sara R. Behrens*

*Also licensed in Minnesota

Thomas L. Zimney
Retired

June 8, 2011

North Dakota Public Service Commission
600 E. Boulevard, Dept 408
Bismarck, ND 58505-0480

Re: **Mitchell Feeds, Inc.**
Our Client: American Federal Bank



Good Morning:

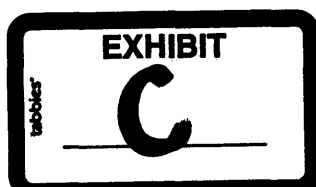
American Federal Bank is a first priority lien holder in the grain inventory of Mitchell Feeds, Inc.

On or about February 24, 2010, American Federal entered into a Security Agreement (the "Security Agreement") with Mitchell Feeds, Inc. and BJM Land, Inc. A true and correct copy of the Security Agreement (together with any collateral agreements) is attached hereto as Exhibit "A". The Security Agreement was given to secure payment of Promissory Notes given by Mitchell Feeds, Inc. and BJM Land, Inc. in favor of American Federal. A true and correct copy of the Promissory Notes are attached hereto as Exhibits "B" and "C".

American Federal perfected its security interest in the Mitchell Feeds, Inc. grain inventory when it filed its UCC-1 Financing Statement on Mitchell Feeds, Inc. with the Minnesota Secretary of State's Office on March 1, 2010. A true and correct copy of the filed Financing Statement is attached hereto as Exhibit "D".

Because Mitchell Feeds, Inc. is licensed to do business in the State of North Dakota as a roving grain buyer under Chapter 60-02.1 of the North Dakota Century Code, Mitchell Feeds, Inc. does not have receipt holders who would have priority status in the grain of Mitchell Feeds, Inc.

The PSC may be within its power to establish a trust on behalf of receipt holders of a roving grain buyer, however, receipt holders of grain sold to roving grain buyers do not have priority status over secured creditors. Chapter 60-02.1 dealing with grain buyers does not afford receipt holders priority status.



51 GE-11-51 Filed: 6/10/2011 Pages: 19
Letter re priority status in grain inventory

American Federal Bank
Tracy A. Kennedy

While Chapter 60-02 gives receipt holders a priority claim over all secured creditors, it only applies to receipt holders of warehouses and warehousemen.

“Receipts” as defined by Chapter 60-02 mean grain warehouse receipts, scale tickets, checks, or other memoranda given by a public warehouseman for, or as evidence of, the receipt, storage, or sale of grain except when such memoranda was received as a result of a credit-sale contract.

A “public warehouseman” means any elevator, mill, warehouse, subterminal, grain warehouse, terminal warehouse, or other structure or facility not licensed under the United States Warehouse Act [7 U.S.C. 241-273] in which grain is received for storing, buying, selling, shipping, or processing for compensation. Provided, however, that nothing in this chapter shall be construed to require a processor to receive, store, or purchase any lot or kind of grain at said facility.

Mitchell Feeds, Inc. is licensed in the State of North Dakota as a “roving grain buyer” meaning a grain buyer who does not operate a facility where the grain is received.

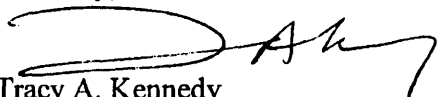
A “grain buyer” is any person other than a public warehouseman as defined in Chapter 60-02, who purchases or otherwise merchandises grain for compensation.

Roving grain buyers receipts do not have priority status.

The Mitchell Feeds, Inc. grain inventory is encumbered with the first priority lien of American Federal Bank. I know the parties interested in the grain have discussed stipulating to sell the grain and to put the proceeds in an escrow account, but American Federal strongly believes it is correct in its first priority position. Please advise as to what the PSC will be claiming as an interest in the Mitchell Feeds, Inc. grain. American Federal Bank would like to repossess its grain inventory collateral and believes that Mitchell Feeds, Inc. will likely surrender its grain inventory upon request.

Time is of the essence and I would greatly appreciate a decision within the next week. Thank you for your consideration in this matter.

Sincerely,



Tracy A. Kennedy
TAK:brdp

Cc: American Federal Bank